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Before the
FEDERAL COMMUNICATIONS COMMISSION
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JUL - 6 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-115
Telecommunications Act of 1996:)	
)	
Telecommunications Carriers' Use)	
of Customer Proprietary Network)	
Information and Other Customer)	
Information)	
)	
Implementation of the Non-Accounting)	
Safeguards of Sections 271 and 272 of the)	CC Docket No. 96-149
Communications Act of 1934, as Amended)	

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429(g) of the Federal Communications Commission's ("Commission") rules, Comcast Cellular Communications, Inc. ("Comcast") submits this Reply to Oppositions to Petitions for Reconsideration of the *Second Report and Order* in these dockets ("Order").^{1/} Specifically, the filings demonstrate that the Commission has the discretion to establish, and has in the past established, asymmetric regulations where market realities and technological differences among industry sectors warrant disparate treatment. The regulation of carrier use of Customer Proprietary Network Information ("CPNI") requires the same consideration and regulatory approach.

^{1/} Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115 (released Feb. 26, 1998).

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As Comcast stated in its petition, and many other parties echoed in their comments, the Commission on reconsideration should focus squarely on relevant market differences in order to frame appropriate CPNI use restrictions. Comcast also raised the need to apply constraints to incumbent LECs' ("ILECs") ability to leverage their wireline monopolies into other market segments. Numerous parties agreed with Comcast and raised significant additional concerns about ILEC misuse of CPNI. Further, many parties share Comcast's view that Bell Operating Company ("BOC") use of CPNI should be restricted not only by the terms of Section 222 but also by the affiliate/competitor nondiscrimination provisions of Section 272. Comcast also agrees with parties who oppose allowing ILECs to use monopoly-based CPNI for customer win-back purposes.

I. CMRS-SPECIFIC RELIEF FROM CPNI RESTRICTIONS IS WARRANTED

The Commission has found that the current CMRS marketplace is competitive.^{2/} Commenters have shown the Commission how integral CMRS CPE is to the marketing of CMRS in this competitive environment.^{3/}

^{2/} See, e.g., *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, Report No. FCC 98-91 (released June 11, 1998).

^{3/} See Arch Communications Group, Inc. Comments in Support of CMRS Petitions for Reconsideration and/or Forbearance ("Arch") at 3-4; AT&T Opposition to and Comments on Petitions for Reconsideration ("AT&T") at 5-6; Comments on Petitions for Reconsideration and Clarification of Celpage, Inc. ("Celpage") at 4; GTE Comments/Opposition to the Petitions for Reconsideration ("GTE") at 3; Support and Opposition of U S WEST, Inc. to Various Petitions for Reconsideration and/or Clarification ("U S WEST") at 3; and Petition for Reconsideration of Comcast Cellular Communications, Inc. ("Comcast") at 3-8.

It is noteworthy that *no party* opposed tailoring CPNI rules to be more consistent with the technological and business realities of the CMRS market.^{4/} Parties across industry segments addressing the issue of CMRS use of CPNI uniformly viewed CPE and information services as integral to rendering CMRS service.^{5/} Parties also illustrated that the "service" package provided by CMRS operators to their customers is far more than a single category of regulated telecommunications service and that CMRS operators should be permitted to access CPNI in the context of their total service relationship with the CMRS customer.^{6/} This approach benefits consumers,^{7/} is consistent with consumer expectations,^{8/} and poses no threat to customer privacy.^{9/}

^{4/} Even MCI, for example, who had initially expressed concern about the wisdom of market specific CPNI rules, found CMRS-specific relief acceptable: "MCI agrees with the CMRS providers that the unique relationship of such services with related CPE and information services justifies the use of CPNI derived from the provision of CMRS to market such CPE and information services without customer approval." Opposition of MCI Telecommunications Corporation ("MCI") at 24. While ILECs framed their comments as requests for reconsideration of the CPNI rules as applied to all market segments, it is plain that the ILECs do not oppose relief for CMRS, but instead seek to extend it to markets where such relief is not currently warranted.

^{5/} See Arch at 3-4; AT&T at 5-9; and Celpage at 3-5.

^{6/} See Arch at 4 and AT&T at 7-8.

^{7/} See Arch at 8-9 and Comments of Bell Atlantic Mobile, Inc., Supporting Petitions for Forbearance at 14-16 ("BAM").

^{8/} See Arch at 9 and Celpage at 5.

^{9/} See BAM at 9-13 and Arch at 8.

II. UNIFORMITY OF CPNI REGULATION IS NOT REQUIRED

While there is a universally recognized need for changes in the CPNI rules to accommodate the CMRS marketplace, ILECs (and only the ILECs) have seized upon these necessary changes as a pretext to destroy meaningful restrictions on their use of CPNI.^{10/} This approach is nonsensical. ILECs have access to the CPNI of every person who uses a wireline telephone, regardless of the nature of that use. No other class of carrier has the ability to manipulate the volume and variety of data that flows through the bottleneck. No other class of carrier is the central point for interconnection, the provider of unbundled network elements, or the holder of approximately 98% of relevant market share.^{11/} To suggest that all of this be ignored by the Commission in setting CPNI rules is blatantly self-serving and perpetuates a barrier to competition in local exchange service.

The ILECs frame this debate by claiming that the Commission must regulate CPNI use uniformly among all market segments.^{12/} But the Commission, in its implementation of the 1996 Act, has already exercised its discretion to vary the application of its rules to different types of

^{10/} Ameritech, for example, describes the prohibition on the use of CPNI to market CPE as "particularly disruptive" to CMRS providers and their customers "because of the way in which integrated service packages have developed in that industry segment and because of the particular technological interdependence between the service and related CPE . . ." yet argues elsewhere that CPNI rules should apply uniformly across all classes of carriers. Ameritech Comments on Petitions for Reconsideration, Clarification, and Forbearance ("Ameritech") at 1-2.

^{11/} See 1998 Annual Report on Local Telecommunications Competition, New Paradigm Resources Group, 9th Ed., Table II (based on comparison of telecommunications revenues).

^{12/} See Opposition of Bell Atlantic to Petitions for Reconsideration ("Bell Atlantic") at 2-5; BellSouth Comments on Petition for Reconsideration ("BellSouth") at 13-16; GTE at 10-16.

telecommunications carriers where circumstances warrant even where statutory provisions seemed to refer to all telecommunications carriers.¹³ None of the ILECs challenge this fact. Other commenters have observed that even if the Commission were to conclude — wrongly in Comcast's view — that it is compelled to adopt uniform regulations, the Commission can forbear from enforcing its rules against CMRS providers.¹⁴

The consequence of applying symmetric regulation for CPNI use is that the Commission will either needlessly hobble the competitive markets with regulation suited to non-competitive ILEC markets, or will prematurely liberate ILECs to the inevitable detriment of competition in the marketplace. The solution to this is not to constrain the way services are sold in the competitive CMRS marketplace but to design specific rules that are appropriate to the different circumstances of competitive and non-competitive market segments.

III. THE COMMISSION SHOULD CLARIFY ITS WIN-BACK RESTRICTION RULE TO BENEFIT CMRS CUSTOMERS

The comments filed on use of CPNI to win-back departing or departed customers show the need for additional analysis and clarification of the CPNI rules to reflect the way the CMRS marketplace works. Comcast and many others pointed out that the inability to review customer CPNI to determine if the customer can be placed on a more desirable service plan does not

^{13/} Comcast at 6 (discussing Commission implementation of Section 254(k) and the universal service high-cost fund).

^{14/} See BAM at 2-3.

comport with the most basic of CMRS customer expectations.^{15/} Customers correctly expect that the parties that provided them service in the past know something of their usage history and will try to be responsive to that usage in their marketing. Competitive market segments such as CMRS should not have a win-back restriction on the use of CPNI.

As with other CPNI use, the Commission should consider a different win-back rule for non-competitive markets. While a majority of the commenters agreed that the use of CPNI for customer win-back should be permitted for CMRS and other competitive markets, a significant number of commenters properly recognized the danger of allowing ILECs to leverage their market dominance and thus objected to ILEC use of CPNI for win-back purposes.^{16/} While a few parties asserted generally that the use of CPNI for win-back purposes is anticompetitive and inconsistent with the statute,^{17/} these parties, at best, succeeded only in showing that the statute is ambiguous, thus leaving the Commission with the discretion to determine the correct interpretation.^{18/}

^{15/} See Comments of AirTouch Communications, Inc. at 10-11 ("AirTouch") and Celpage at 9-10.

^{16/} See Opposition and Response to Petitions for Reconsideration and Clarification ("Cable and Wireless") at 4-5; Response of e.spire Communications, Inc. to Petitions for Reconsideration ("e.spire") at 3-4; Response to Petitions for Reconsideration of Intermedia Communications, Inc. ("Intermedia") at 3; MCI at 15-17; Reply Comments of Pagenet ("Pagenet") at 3.

^{17/} See Opposition of the Association for Local Telecommunications Services to Petitions for reconsideration ("ALTS") at 3. See generally, Comments of the Public Utility Commission of Texas on Telecommunications Use of CPNI ("PUC of Texas").

^{18/} See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

IV. THE COMMISSION SHOULD TAKE ACCOUNT OF ILEC POTENTIAL FOR MISUSE OF CPNI

Only the ILECs seem to believe they are not uniquely situated to benefit from the use and misuse of CPNI developed from their years of monopoly service. Comcast discussed this competitive advantage that ILECs have, given the volume of sensitive CPNI that they possess as the monopoly provider of local exchange service.^{19/}

A number of other parties agreed with Comcast and expanded on Comcast's concerns.^{20/} For example, Worldcom noted that ILECs have access to information on every customer of a CLEC if the CLEC either purchases ILEC unbundled network elements or resells ILEC services.^{21/} Similarly, concern was expressed that because ILECs have administrative responsibility for executing PIC changes either for interexchange or local services, they gain valuable carrier-to-carrier information, and they must be explicitly prohibited from using this in end-user customer marketing.^{22/}

In response to concerns Comcast raised about the unfairness of ILECs' use of CPNI to market Digital Subscriber Line and second line services to their monopoly customers — an obvious competitive advantage for ILECs that arises out of their possession of CPNI — BellSouth asserted that such practices are legal and should be permitted. BellSouth either misses

^{19/} Comcast at 11, 20-23.

^{20/} Cable & Wireless at 4-5; e.spire at 3-4; Intermedia at 3; MCI at 15-17; Pagenet at 3.

^{21/} Worldcom Opposition ("Worldcom") at 2.

^{22/} MCI at 16-17.

or intentionally overlooks Comcast's point -- if CPNI rules permit ILECs to use monopoly CPNI to enter new and competitive market areas, other service providers attempting to compete in these new markets will be unfairly disadvantaged by the ILECs' unearned advantage.

There also is overwhelming support from parties other than the BOCs for reversal of the Order's conclusion that Section 272 imposes no additional CPNI requirements on BOCs sharing CPNI with their affiliates. These parties argue that the Commission should reverse its determination to treat BOCs' and BOCs' affiliate use of CPNI just like that of any other telecommunications service provider.^{23/} They also recognize that the Commission's conclusion is in conflict with its previously stated intention to construe the terms of Section 272(c)(1) broadly to extend its nondiscrimination protection to "any good, service, facility, or information" that a BOC provides to its Section 272 affiliate.^{24/} Plainly, CPNI is a type of information to which Section 272 should apply.

Finally, Ameritech contends that Section 272(g)(2) excludes joint marketing from the more general Section 272 nondiscrimination requirement and that BOC provision of CPNI to market or sell the services of its Section 272 affiliate would be excluded under this provision.^{25/} Comcast challenges this reading of the statute. While the act of jointly marketing and selling

^{23/} See AT&T at 2; Opposition and Comments of Sprint Corporation ("Sprint") at 5-8; Worldcom at 3-7.

^{24/} Implementation of the Non-Accounting Safeguards of Section 271 and Section 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149, FCC 96-489 (1996) at ¶¶ 216 and 218.

^{25/} Ameritech at 10.

services may be excluded by the exception, the exception does not extend to all information a BOC provides to its affiliate for purposes of such joint marketing, and it does not apply to CPNI.

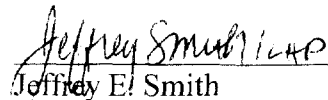
V. CONCLUSION

There is enormous concern expressed on the record that the rules as set forth in the CPNI Order must be revised to account for differences in market segments. In particular, there was unanimous agreement that the CPNI rules are particularly disruptive of the workings of the competitive CMRS market and interfere with customer expectations. The CPNI rules must be reformed for the CMRS market. Comcast urges the Commission on reconsideration to fashion CPNI rules that reflect critical differences between competitive and non-competitive telecommunications markets. Similarly, the Commission should reject ILEC attempts to expand the relief plainly warranted in the CMRS market to ILEC use of CPNI gained in their capacity as monopoly local service providers. There is simply no legal requirement that all classes of telecommunications carriers be treated alike when their particular circumstances differ. Application of uniform CPNI regulation will either prematurely liberate ILECs to the detriment

of competition or it will needlessly hobble the competitive CMRS marketplace with ill-suited regulations. Careful revision to the Commission's CPNI regime can promote competition consistent with the requirements of Section 222 of the 1996 Act.

Respectfully submitted,

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I, Jeanette Corley, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 6th day of July, 1998, a copy of the foregoing Reply to Oppositions to Petition for Reconsideration was sent by hand delivery where indicated, and U.S. mail to the following:

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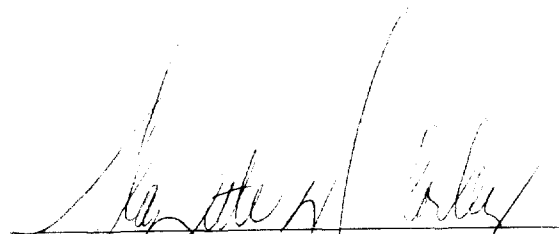
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